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Nos. 83-1891 and 83-1892

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY P. JANNOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE X. SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entrapped as a matter of law.

2. Whether the Due Process Clause requires that petitioners' convictions be reversed because the government's conduct of the investigation was improper.

3. Whether petitioners' convictions should be set aside because the trial court did not specifically instruct the jury that it was to find that the government induced petitioners to commit the offenses unless the government disproved that fact beyond a reasonable doubt, when the trial court did instruct the jury that the government was required both to prove predisposition and to disprove entrapment beyond a reasonable doubt.

4. Whether petitioners' convictions for conspiracy to commit extortion that interferes with interstate commerce, in violation of the Hobbs Act (18 U.S.C. 1951), must be reversed because the illicit payments were received from undercover FBI agents in connection with a fictitious scheme and therefore could not actually have affected interstate commerce.

5. Whether petitioners' Hobbs Act convictions should be set aside on the ground that petitioners did not induce or demand the payments made to them.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. 1-39) is reported at 729 F.2d 213. An earlier opinion of the court of appeals (Pet. App. 47-151), reversing the district court's order entering post-trial judgments of acquittal, is reported at 673 F.2d 578. The post-trial opinion of the district court (Pet. App. 175-223) is reported at 501 F. Supp. 1182. The district court's pretrial opinion dismissing certain counts of the indictment (Pet. App. 153-172) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1984. A petition for rehearing was denied on March 20, 1984. The petitions for a writ of certiorari were filed on May 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, each petitioner was convicted on one count of conspiracy to obstruct interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Petitioner Schwartz was also convicted on one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962(d)). Petitioner Jannotti was sentenced to a six month term of imprisonment and fined $2,000, and petitioner Schwartz was sentenced to a one year term of imprisonment and fined $10,000.

1. Petitioners' offenses arose out of the FBI operation known as Abscam. That operation involved undercover agents who posed as representatives of a wealthy Arab sheik who was seeking to invest money in the United States and to emigrate here. The Abscam operation led first to Angelo Errichetti, the mayor of Camden, New Jersey, who was subsequently convicted of numerous charges arising out of the investigation. See *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Errichetti introduced the agents to Howard Criden, a lawyer from Philadelphia. At one point in his dealings with the agents, Criden told them that, for a fee, he could arrange introductions to various congressmen who would help the sheik remain in America after he emigrated. The agents assented. Four congressmen were subsequently indicted and convicted for agreeing to sponsor private asylum legislation on behalf of the sheik in exchange for cash payments. See *United States* v. *Myers*, *supra*.

One of those congressmen, Representative Myers of Philadelphia, suggested that if the sheik invested in a project in his district it would provide a credible explanation for any future assistance to the sheik. FBI informant Weinberg, following Myers's suggestion, contacted Criden, told him that the sheik was "looking to build a hotel" in Philadelphia, and suggested that Criden arrange meetings with congressmen regarding the hotel project. Pet. App. 51-52; Tr. 2384A.[1] Criden responded that Weinberg should find out the specifics of the project so that Criden could direct them to officials who could "give you more help" in connection with such a project than a congressman would (Pet. App. 52). Criden boasted that he knew "Everybody!" in Philadelphia and said: "Remember, I got a [law] partner who's a city councilman" (*ibid.*).

A week later, FBI undercover agents Wald and Haridopolos, posing as representatives of the sheik, met with Criden in the agents' hotel room. Their conversation was videotaped. Criden assured them that they could deal candidly with his law partner, city councilman Louis C. Johanson, and that the "tariff" for Johanson's help would be $25,000. Pet. App. 52-54. Criden also told the agents that petitioner Schwartz, the City Council President, was a powerful figure in city government, and that the agents could also "deal" with Schwartz, although "[h]e may want to handle it indirectly" (*id.* at 53). Criden said the "tariff" for Schwartz would be $50,000. The agents balked at this figure and suggested $30,000; Criden agreed to "run it up the flagpole." Criden asked for a fee of $10,000 for delivering both city councilmen. *Id.* at 54.

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[1]This citation to the transcript is derived from the briefs filed by the government in the court of appeals.

Several hours later, Criden returned to the hotel room with Johanson. Johanson assured the agents that the hotel project would be able to avoid any conflict with city licensing and inspecting authorities. Specifically, he said that the authorities are "not gonna monkey with you for a minute because they're gonna be told not to" (Pet. App. 54). Johanson went on to state that he, Schwartz, and petitioner Jannotti "run the City Council." The following conversation about Jannotti then occurred (Pet. App. 55):

> WALD: Would he be interested in doing business with us.
>
> JOHANSON: I don't know that it's necessary but if you want to we can.
>
> WALD: I don't know — if it is — you're the best judge of that.
>
> JOHANSON: I think George [Schwartz] is ah —
>
> CRIDEN: Well, it might not be a bad idea to bring Harry [Jannotti] up.
>
> JOHANSON: We can bring Harry up. Harry's the Majority Leader. He's the — ya know, second in command.
>
> WALD: Yea.
>
> JOHANSON: He's got seniority.

Johanson was given a $25,000 payment. The following exchanges occurred in connection with this payment (Pet. 55):

> HARIDOPOLOS: Are you acquainted with how much ah, ya know, ah for the favor and for all these assur — assurances, right.
>
> CRIDEN: Right.
>
> HARIDOPOLOS: You know how much it is?

JOHANSON: Sure.

HARIDOPOLOS: How much is it?

JOHANSON: Twenty-five.

HARIDOPOLOS: Okay, ah but, of course, ah, we have to have these proper assurances. You do us a favor, we're doin' you a favor.

CRIDEN: Obviously.

JOHANSON: Sure.

* * * * *

WALD: And for 25 we've got a friend.

JOHANSON: Right.

Three days later Criden brought Schwartz to meet with the sheik's representatives.[2] This meeting was also videotaped. Criden stated that he had discussed the hotel project "at length" with Schwartz. Undercover agent Wald said that he was concerned about "problems such as * * * zoning and variances and this type of thing" and that his mission was to "take care of any potential problems long before they exist" (Pet. App. 58). As the court of appeals put it, "Schwartz responded to this overture with a soliloquy on his own political power and importance" (*ibid.*). The following exchange, quoted by the court of appeals, then occurred (*id.* at 58-59):

SCHWARTZ: * * * I have been close to every chairman [of the Democratic National Committee] * * *. I am a member of the Democratic National

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[2]Criden was introduced to Schwartz by a mutual friend, a municipal judge, who told Schwartz that Criden represented investors who wanted Schwartz's "advice" and would be willing to pay for it (Pet. App. 56). There was evidence that the judge received $3,000 in cash from Criden for his services (Pet. App. 57 n.5).

Committee. I am a member of the State Committee. I am a member of the City Committee. A Ward Leader. I, uh, I have a ward — if you know what that means in politics.

* * * * *

WALD: Is it fair to say that by doing business with you, uh . . . my zoning problems become . . .

SCHWARTZ: Right.

CRIDEN: You, you don't have any.

WALD: Okay. Now. There are what, 17 members, as, as you say . . . and also what uh I read here . . .

SCHWARTZ: Right.

WALD: Uh, do we have a uh controlling vote . . .

SCHWARTZ: Yes.

WALD: . . . problem here?

SCHWARTZ: No . . .

WALD: Uh.

SCHWARTZ: No.

WALD: Can you control . . .

WALD: . . . those types of factions?

SCHWARTZ: Yes.

WALD: You can control them? . . .

SCHWARTZ: The proof was today. The proof was the election of myself as president again.

WALD: Uh hmm.

SCHWARTZ: In other words, we got uh five or six n[e]w members that came in. Uh, you tell me your birth date. I'll give them to you for your birthday.

* * * * *

WALD: All right. You're controlling the council at this point.

SCHWARTZ: Right.

WALD: As far as I'm concerned.

SCHWARTZ: Right.

CRIDEN: Right. And has been for . . .

SCHWARTZ: Right. Right.

WALD: Should we have anything that comes up to a vote, that has to be done on a vote basis, the council is with you.

SCHWARTZ: Yes.

WALD: You control them at this point.

SCHWARTZ: Yes. Yes. Yes.

CRIDEN: 100 percent.

SCHWARTZ: Yes.

Schwartz subsequently explained that his ability to control the city government extended beyond the council (Pet. App. 60-61):

SCHWARTZ: There is a Board of Building Standards. There, there is built-in relief every stage of the way. There's a Zoning Board of Adjustment for variances.

WALD: Okay. Can you control that?

SCHWARTZ: Yes . . .

* * * * *

WALD: Okay. Meaning that, if City Council has to vote on it, we don't have a problem at this point?

SCHWARTZ: Well, I'm going further. There are other boards and agencies, uh, depending upon what your client, how idiosyncrant [*sic*] he wants to be and how eccentric he wants to be.

WALD: (Laughter) . . . They can become rather eccentric.

SCHWARTZ: All right. All right. It may be necessary to go to these various boards and commissions. Now, they are part of the organization. They are part and parcel and . . .

WALD: Appointed, appointed officials?

SCHWARTZ: Yes, they are appointed officials. Uh, but uh, as I say, uh, I always do my homework. And, uh, the mayor is a very strong mayor. We have a strong mayor form of government. And all these people are his appointees. My understanding with him is that I go to him — period. I don't even have to go to one of the flunkies, one of the functionaries. I go to him . . . [3]

The discussion subsequently turned to Schwartz's payment, as follows (Pet. App. 61-63):

WALD: * * * We've talked to Howard [Criden], you know, the figures, the dollars we're talking about are in the right ballpark. We're . . .

SCHWARTZ: That's not my prime concern. I'm interested in the City of Philadelphia. I'm interested in a good project. I'm interested in tax rateables. I want to see Center City develop. Especially Center City. There are a few parcels left. Well anything else that's going to

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[3]The Abscam operation disclosed no reason whatever to believe that Mayor Green of Philadelphia was corrupt; the contrary is true. See page 11, *infra*.

add to the tax rateables of the city that's going to create jobs.

WALD: I am again quick to say that I'm not really interested in the City of Philadelphia to be candid.

SCHWARTZ: Well I have to be. I have to be.

WALD: Perhaps, oh sure . . . (inaudible)

CRIDEN: Your primary concern is to see that if your employer decides to move, you have a minimum amount of problems.

WALD: Exactly . . . Problems are to be handled before they arise. Right. Should any minor problems come up. Should any problems that are councilmatic in scope. . .

SCHWARTZ: No problem.

WALD: You could take care of them. Those are the type of things . . .

SCHWARTZ: Right.

WALD: That he asks I make an unequivocal, yes, it's been handled, it's been taken care of and uh . . .

CRIDEN: You make that an unequivocable yes.

SCHWARTZ: It's . . . I would say to you that it's much easier now than it is than it was four years ago.

* * * * *

SCHWARTZ: There are administrative escape hatches for everything in the City of Philadelphia under our various codes. There's a way of doing it —administrative way of doing it.

WALD: Okay, and that is the type of thing you can handle for us.

SCHWARTZ: Oh yeah, right.

WALD: I can go back and say I met a gentleman. We had a business deal uh. I've made a friend in Philadelphia.

SCHWARTZ: Yes.

WALD: And things are taken care of . . .

SCHWARTZ: Right . . .

WALD: Okay, and the sums appropriate and we're in good shape. Okay.

Shortly thereafter, Wald handed Schwartz an envelope containing $30,000 in cash, the payment previously agreed upon with Criden. Schwartz accepted the envelope. He then reaffirmed his commitment (Pet. App. 63):

WALD: The legislative problems we've taken care of ?

CRIDEN: No problem.

WALD: Okay, that I can, that I, that I got assurance on.

SCHWARTZ: Right.

CRIDEN: You have, you have no problem.

WALD: Okay, the other things can be done through attorneys, but the legislative problems don't exist anymore?

CRIDEN: That's right.

SCHWARTZ: No. Do not.

WALD: Okay.

Criden remained behind after the meeting, and Wald expressed an interest in meeting petitioner Jannotti. Criden said he would approach Jannotti but said to Wald, "if the

answer is no, I'm going to tell you right off the bat, forget it" (Pet. App. 63). Wald asked if there was anyone else with whom he should try to do business, and Criden told him there was not (*id.* at 64). Notably, notwithstanding Schwartz's boasting about his relationship to Mayor Green of Philadelphia, Criden told the agents that the mayor was "an All American boy" and that it would be "a critical mistake" to approach him (*id.* at 58).

Criden brought petitioner Jannotti to the agents the following evening. This meeting was also videotaped. In response to Wald's allusions to the payment Jannotti was about to receive, Jannotti, echoing Schwartz, emphasized that he would assist the sheik's project because it was "legitimate" and would aid Philadelphia. But when agent Haridopolos said: "A lot of legitimate, ah, things get bogged down, we don't want to be bogged down" (Pet. App. 66), Jannotti replied (*ibid.*): "No, I can't see this being bogged down."

Shortly before Jannotti was handed cash, Wald said: "Did he [Criden], was he very graphic with ya?" and Jannotti replied "Yes." Wald said: On exactly how . . ."; Jannotti nodded and said: "He was always up front, up front" (Pet. App. 67). Immediately before Jannotti was paid, the following exchange occurred (*id.* at 68-69):

> WALD: Can I go back, ah ah, to my employer, the Sheik and tell him that I dealt with a man, on Wednesday night tell him who he is, dealt with you, Thursday night, explain who you were, what your position is and say he and I conducted a cash business transaction and he guaranteed me, we don't have a problem in Philadelphia. We ah, ah City Councils on our side the man has the influence with the Finance Committee, he has influence . . .

JANNOTTI: You wouldn't, you wouldn't be able to say we don't have a problem. Problems might arise, but problems ah, you might say problems can be solved.

WALD: Ok, you can handle those problems we presume.

JANNOTTI: I don't see why not if its a legitimate, if it's a if it's a legitimate if it's a, if it's a legitimate enterprise, it's a legitimate piece of business.

WALD: By making friends with you this evening, if we have to go to City Council and say look, ya know, give us a break, right, got us some legislation that this is ok. That its in the right neighborhood, that the time.

CRIDEN: If you want a street for example let's say changed from a two way to a one way ok, maybe that will help you.

WALD: Ok.

CRIDEN: Handle your traffic pattern.

JANNOTTI: We handle that everyday.

WALD: But I go back and I'll say we have this, and I'll use that as an example that if we have a one way street situation and it's just hurting the front, of, of the place we cannot move people in and out of the hotel limousines to private vehicles and what have you, ah the men I dealt with said they will help. I'm not saying that you could walk in there and change this thing tomorrow, but.

CRIDEN: Yet.

JANNOTTI: We'll go in there and battle, we'll go in and battle.

WALD: You're with us?

JANNOTTI: Certainly, we'll go in and battle.

Wald then handed Jannotti an envelope containing $10,000 in cash and asked if "that amount is sufficient." Jannotti took the envelope and said "We've discussed it" (Pet. App. 69). The following exchange then occurred (*ibid.*):

HARIDOPOLIS: You know how much it is?

CRIDEN: Tell him, you can tell him.

HARIDOPOLIS: How much is it?

CRIDEN: Tell him?

JANNOTTI: We won't even discuss it.

WALD: Ok, but you did discuss it with Howard?

JANNOTTI: We won't even discuss it.

HARIDOPOLIS: Is this arrangement please, pleasing to you?

JANNOTTI: As I say, we won't even discuss it.

WALD: Ok, well, we've done our business.

2. Petitioners were indicted with Johanson and Criden. The prosecutions of the latter two were dropped after they were convicted in the United States District Court for the Eastern District of New York on charges growing out of another aspect of the Abscam operation. Petitioners were convicted by a jury, but the district court entered a judgment of acquittal on all counts and dismissed the Hobbs Act charge (Pet. App. 175-223). The district court's decision rested on four grounds: that the government had not demonstrated a sufficient connection between petitioners' activities and interstate commerce to support the Hobbs Act convictions (*id.* at 175-179); that the evidence established entrapment as a matter of law (*id.* at 183-218); that the government's conduct of the investigation was "so outrageous as to amount to a violation of due process" (*id.* at 218;

see *id.* at 218-222); and that federal jurisdiction over the offenses was "artificially created" by the government (*id.* at 223; see *id.* at 221-222). The district court remarked, however, that "[n]o-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence" (Pet. App. 223).

The court of appeals, hearing the case en banc, reversed the district court's order in a comprehensive opinion on which we rely (Pet. App. 47-116).[4] This Court denied certiorari. 457 U.S. 1106 (1982). After petitioners were sentenced, they again appealed, and the court of appeals affirmed (Pet. App. 1-39).

ARGUMENT

1. Petitioners contend (83-1891 Pet. 25-27; 83-1892 Pet. 21-23) that they were entrapped as a matter of law because the evidence was insufficient to establish their predisposition to accept the illicit payments. This contention is insubstantial.

We note first that the Abscam operation did not target petitioners at random or for an arbitrary purpose; Criden, petitioners' co-conspirator, brought petitioners to the undercover agents' attention. Criden had a demonstrated capacity for delivering corrupt public officials; before he brought petitioners to meet the agents he delivered Johanson, whose corruption was manifest. In addition, the agents had reason to believe that Criden did not make reckless claims about who was susceptible to corruption; he cautioned the sheik's representatives in strong terms against approaching Mayor Green and other members of the city council. As the court

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[4]Judges Aldisert and Weis dissented, essentially for the reasons stated by the district court (Pet. App. 117-151).

of appeals noted (Pet. App. 92), "the statements of Criden and Johanson indicating that [petitioners] would be ready and willing to accept payments in return for political favors and that they had done so in the past * * * support the jury's determination that [petitioners] were predisposed."

As the court of appeals also noted, however (Pet. App. 92), petitioners' own videotaped statements and actions reveal ample evidence of their predisposition to accept payments in return for political favors. The evidence permitted the jury to find that petitioners attended a meeting at which they knew, from Criden, that they would be given bribes. Agent Wald made it clear at the outset of both meetings that he was seeking "assurances" and political favors. Petitioner Schwartz boasted at length in an effort to impress the persons whom he believed were willing to make a large payment to him; indeed, he promised to "give" Wald the votes of city council members "for your birthday." Petitioner Jannotti agreed with Wald's characterization of their relationship as a "cash business transaction" that would "guarantee[] . . . that we don't have a problem in Philadelphia" (Pet. App. 92-93).

At the end of the meetings, petitioners unflinchingly accepted large payments — in cash — that could have had no conceivable honest purpose. While the agreements between petitioners and the agents were arrived at only after a degree of circumlocution and oblique references to the fact that cash was being exchanged for political influence — a manner of discourse that is hardly surprising in view of the blatantly illegal nature of the transaction — the agents did not engage in anything remotely resembling the relentless, badgering, high-pressure tactics that this Court has held to constitute entrapment as a matter of law. See *Sherman* v. *United States*, 356 U.S. 369, 373-374 (1958).

In fact, as the court of appeals noted, petitioners can "point to no statements or gestures which indicate any reluctance whatsoever to accept the proffered payments"

(Pet. App. 102). Petitioners did not attempt to report the incident or turn the money over to the city government. The jury viewed the meetings on videotape and had an opportunity to study "the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents" (*id.* at 103). The jury was then carefully instructed that "in order to find predisposition based merely upon the fact that the defendant did in fact commit the crime * * * it is very important that you compare and analyze the * * * alacrity with which the defendant joined the enterprise versus the extent of the inducement which was offered to him" (*ibid*). The jury's conclusion that the source of petitioners' willingness to accept corrupt payments was their own predisposition, and not government pressure, was plainly reasonable and does not merit review by this Court.

2. Petitioners also assert that even if they were predisposed, the government's conduct of the investigation was so outrageous that the Due Process Clause requires that their convictions be reversed (83-1891 Pet. 18-22; 83-1892 Pet. 9-14). This argument has been advanced by other defendants whose convictions resulted from similar aspects of the Abscam investigation; it has been uniformly rejected by the courts of appeals, and this Court has denied review. See, *e.g., United States* v. *Silvestri*, 719 F.2d 577, 581 (2d Cir. 1983); *United States* v. *Weisz*, 718 F.2d 413, 440-441 (D.C. Cir. 1983), cert. denied, No. 83-1036 (Feb. 21, 1984); *United States* v. *Kelly*, 707 F.2d 1460 (D.C. Cir.), cert. denied, No. 83-308 (Oct. 11, 1983); *United States* v. *Williams*, 705 F.2d 603, 619-622 (2d Cir.), cert. denied, No. 83-256 (Dec. 5, 1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Petitioners' contention is equally insubstantial.

Petitioners advance essentially two arguments in support of this contention. First, they insist that the government's role in designing and operating the criminal scheme was

excessive and that the government "created" crimes that would otherwise not have occurred (see 83-1891 Pet. 18-19, 20-21; 83-1892 Pet. 10, 12). While it is true that the undercover agents conceived important aspects of the criminal scheme, and that the crimes would not have occurred in this form if the government had not been involved, that is routinely true of undercover operations and has never been thought sufficient to bar a prosecution. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman*, 356 U.S. at 372; *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). That is all the agents did here; by acting as representatives of a wealthy person who was willing to pay bribes to obtain political favors, the agents reproduced circumstances likely to arise in reality and provided political figures who were willing to be corrupted with an opportunity to reveal their true colors.

The second argument petitioners advance in support of their contention that the Due Process Clause bars their convictions is, essentially, the same argument they advanced in support of their entrapment claim — that they were not predisposed to commit the acts charged. See 83-1891 Pet. 19; 83-1892 Pet. 11. Specifically, petitioners insist that Abscam was "designed to lure innocent persons into its web" (83-1891 Pet. 19; see 83-1892 Pet. 10) and that "extreme pressure" was brought to bear on petitioners to accept the bribes (83-1891 Pet. 19; see 83-1892 Pet. 11). But the question whether the government has pressured innocent persons into committing crimes is properly comprehended by the entrapment defense. As we have explained, there is abundant support for the jury's conclusion that petitioners were predisposed beyond a reasonable doubt to

accept illicit payments and that they did not succumb to excessive government pressure.

In general, the record in this case shows that there was nothing questionable or improper about any aspect of the operation that led to petitioners' convictions. The undercover agents acted in the way that would be expected of any person seeking to exchange money for political favors. They made contact only with persons whom they had reason to believe would be susceptible to corruption, although there was no constitutional requirement that they limit their investigation in this way. As the court of appeals explained (Pet. App. 88-90), the sums they offered cannot be regarded as excessive. Petitioners object that Criden was paid on a contingent fee basis and that his actions were not supervised (83-1891 Pet. 19; 83-1892 Pet. 11); but they suggest no reason to doubt that a middleman like Criden — to whom, of course, the agents did not reveal their true identity — would receive a contingent fee from persons actually interested in corrupting politicians. Nor do petitioners explain how the agents could have supervised Criden or paid him on another basis without compromising the undercover operation.

Similarly, petitioner Jannotti objects that the government did not obtain a sufficiently explicit statement from him to the effect that he understood the corrupt nature of the agreement (83-1891 Pet. 21). But as the Second Circuit explained in an Abscam case that involved members of Congress (*Myers*, 692 F.2d at 843-844):

> Undercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action."

Indeed, in another phase of the Abscam operation, Mayor Errichetti criticized another of the sheik's representatives for being insufficiently subtle in offering a bribe to an official. *United States* v. *Myers*, 527 F. Supp. 1206, 1227 n.17 (E.D.N.Y. 1981), aff'd in part and rev'd and remanded in part, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Here, the jury, after viewing the videotape, evidently concluded that petitioners' insistence that the hotel project be legitimate reflected only their desire not to commit themselves to public support of an embarrassing project, and that Jannotti's too frequent protestations that he was seeking only to aid Philadelphia were nothing more than an effort to avoid making a directly incriminating statement and were belied by his ready acceptance of a cash payment he obviously expected.

Finally, petitioners contend that they were subject to unfair pressure because the agents appealed to their "civic duty" and suggested that the hotel would not be built if they did not accept the payments (83-1891 Pet. 19; 83-1892 Pet. 11). As the court of appeals demonstrated, no such suggestion was ever made to Schwartz, and the agents' remarks to Jannotti, taken as a whole, not only did not place unfair pressure on him but gave the clear impression that the hotel would be built in Philadelphia no matter how Jannotti responded (Pet. App. 96-99). In any event, even if the agents had made the project contingent on petitioners' acceptance of the payments, their actions would not have created temptations and pressures exceeding those with which municipal officials are sometimes faced; and such officials scarcely do their "civic duty" when they accept a large cash payment instead of reporting such an incident to the authorities.

This Court made it clear in *Hampton* v. *United States, supra*, that government involvement in a criminal scheme would bar the conviction of a predisposed defendant only in the most extraordinary case, if at all. See 425 U.S. at 495 n.7 (Powell, J., concurring). Since *Hampton* was decided, there

has been only one occasion on which a court of appeals has held that a prosecution was precluded on this ground, and that decision was reached by the Third Circuit itself. *United States* v. *Twigg*, 588 F.2d 373 (1978). In this case, the Third Circuit, en banc, convincingly distinguished *Twigg*. See Pet. App. 108-110. Further review of the due process claim by this Court is plainly unwarranted.

3. Petitioners also contend (83-1891 Pet. 23-25; 83-1892 Pet. 14-20) that their convictions should be reversed because of an erroneous instruction on entrapment. The instruction was as follows (Pet. App. 18):

> If you find from the evidence that there was inducement, that the crime was induced by the Government agents * * * you would therefore acquit the defendants unless the evidence as a whole satisfies you beyond a reasonable doubt that they were predisposed.
>
> In short, the burden is upon the Government in a case of this kind to prove beyond a reasonable doubt that there was no entrapment. If the defendants were induced to commit the crime, then they were entrapped and should be acquitted unless the Government satisfies you beyond a reasonable doubt that they were predisposed to commit the crime.

The court of appeals ruled that while this instruction correctly placed on the goverment the burden of proving predisposition beyond a reasonable doubt, it was erroneous in two respects: it separated the issues of inducement and predisposition, and it did not clearly state that the jury was to find inducement unless the government proved lack of inducement beyond a reasonable doubt (Pet. App. 20-21). See *United States* v. *Watson*, 489 F.2d 504, 510, 511 (3d Cir. 1973).

Even though it ruled that tne instruction was erroneous, the court of appeals unanimously declined to reverse petitioners' convictions, for the following reasons (Pet. App. 21-22):

> We are not confronted here with an error affecting the defendants' constitutional rights. The entrapment defense "is not of a constitutional dimension," *United States* v. *Russell*, 411 U.S. 423, 433 (1973), and the erroneous instruction affected no other possible constitutional right. We are therefore not required in this appeal to find beyond a reasonable doubt that the error was harmless. *Chapman* v. *California*, 386 U.S. 18 (1967). Instead, we must use the "highly probable" standard of appellate review discussed [in] *Government of Virgin Islands* v. *Toto*, 529 F.2d 278, 284 (3d Cir. 1976). Applying this standard to the circumstances of this case, we hold that the erroneous instruction is not reversible. * * * As noted above, the district court charged the jury that it was obligated to acquit the defendants if the government failed to disprove entrapment beyond a reasonable doubt. This part of the charge was correct.
>
> The charge was erroneous insofar as the district court improperly required the defendants to show some evidence of inducement, either by introducing their own proof or by reference to the government's evidence. This evidence, however, was patent: the government had created an elaborate fiction to convince the defendants that an Arab sheik was prepared to pay bribes to local officials in exchange for favors.
>
> The district court correctly placed on the government the burden of proving predisposition beyond a reasonable doubt. We find that the government's evidence established overwhelmingly that the defendants enthusiastically accepted bribes. There simply is no

> credible evidence that the defendants were reluctant to take the money. To the contrary, the evidence shows the defendants, each of them an elected public official, boasting of their power and their corruption. In view of this overwhelming proof, we conclude without hesitation that the defendants were not prejudiced by the district court's error.

While we do not necessarily agree with the court of appeals that the instruction was erroneous (see *United States* v. *Sherman*, 200 F.2d 880, 882-883 (2d Cir. 1952) (L. Hand, J.), rev'd on other grounds, 356 U.S. 369 (1958)), the court's conclusion that any error was harmless plainly does not merit further review. The instruction did not explicitly place on petitioners the burden of proving any element of the entrapment defense; on the contrary, it explicitly required the government to disprove entrapment beyond a reasonable doubt. Petitioners themselves repeatedly emphasize, in connection with their other contentions, "[t]he extraordinary degree of government inducement in this case" (83-1891 Pet. 25; see *id.* at 13, 18-22; 83-1892 Pet. 9-14, 21, 23); it is most unlikely that the jury's conclusion was affected by the fact that the instruction did not unequivocally place on the government the burden of proof on the inducement issue.

In any event, the court of appeals' conclusion that the alleged error was harmless is based on the particular facts of this case. Contrary to petitioners, there is no conflict among the circuits on the harmless error standard that should be applied; indeed, that standard is derived directly from this Court's decision in *United States* v. *Kotteakos*, 328 U.S. 750, 764-765 (1946). See *Government of the Virgin Islands* v. *Toto*, 529 F.2d 278, 283-284 (3d Cir. 1976).[5] But even if

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[5]Many of the cases cited by petitioner Schwartz (83-1892 Pet. 17-18) deal not with entrapment but with other defenses or with the government's proof of an element of the offense. Moreover, in each of these cases the instruction utterly failed to mention the government's burden

there were a conflict, it seems clear beyond a reasonable doubt that any error in connection with the instruction on inducement would not have affected the jury's verdict in the circumstances of this case.

4. The Hobbs Act, 18 U.S.C. 1951(a), provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article * * * in commerce, by * * * extortion or attempts or conspires so to do" is guilty of a crime. Petitioners were convicted of conspiracy to violate the Hobbs Act. They contend (83-1891 Pet. 10-16;

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of proof beyond a reasonable doubt in connection with the defense (or mentioned it only in a highly confusing fashion). See *Davis* v. *United States*, 160 U.S. 469 (1895) (sanity; burden of proof erroneously placed on defendant); *United States* v. *Read*, 658 F.2d 1225, 1236-1239 (7th Cir. 1981) (membership in conspiracy); *Berrier* v. *Egeler*, 583 F.2d 515, 517-518 (6th Cir.), cert. denied, 439 U.S. 955 (1978) (self-defense); *United States* v. *Alston*, 551 F.2d 315 (D.C. Cir. 1976) (alibi); *United States* v. *Corrigan*, 548 F.2d 879 (10th Cir. 1977) (self-defense). By contrast, the district court here clearly instructed the jury that the government had to prove entrapment beyond a reasonable doubt and that it had to prove predisposition beyond a reasonable doubt.

Contrary to petitioner Schwartz (83-1892 Pet. 18), nothing in *United States* v. *Benavidez*, 558 F.2d 308 (5th Cir. 1977), suggests that even a complete failure to give an entrapment instruction is constitutional error. And none of the cases cited by petitioners (83-1891 Pet. 24-25 n.16; 83-1892 Pet. 19) establishes a rule of automatic reversal for an erroneous instruction on entrapment. Indeed, most of the cases cited by petitioner in which the court held an entrapment instruction to be erroneous involved a failure by the court to instruct clearly that the government had the burden of proving predisposition beyond a reasonable doubt. See *United States* v. *Dearmore*, 672 F.2d 738, 740-741 (9th Cir. 1982); *United States* v. *Wolffs*, 594 F.2d 77, 79-84 (5th Cir. 1979); *United States* v. *Ambrose*, 483 F.2d 742, 753 (6th Cir. 1973); *Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966). We note that in *Ambrose* the court appears to have approved an instruction like that given here (483 F.2d at 753 n.7). In *United States* v. *Tate*, 554 F.2d 1341, 1343-1345 (5th Cir. 1977), the court explicitly applied a harmless error standard.

83-1892 Pet. 24-28) that because the hotel project in connection with which they accepted the illicit payments was fictitious, their acts could not have affected interstate commerce and therefore did not constitute a conspiracy to violate the Hobbs Act.

Petitioners rely heavily (see 83-1891 Pet. 11; 83-1892 Pet. 24-25) on *United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc) (Stevens, J.), cert. denied, 423 U.S. 837 (1975). Petitioners are correct that *Staszcuk* has been generally followed by other circuits, but the holding and reasoning of *Staszcuk* are decisively contrary to petitioners' contention. In *Staszcuk*, the defendant, a local official, received $3,000 in exchange for his support of a zoning change that would have enabled an animal hospital to be built, but the hospital was never built. "Therefore, there [was] no evidence that either the zoning change or the payment had any effect whatsover, either favorable or unfavorable, on interstate commerce." 517 F.2d at 55. The court nonetheless *upheld* the defendant's conviction for a substantive violation of the Hobbs Act. The court stated (*id.* at 59-60; footnotes omitted):

> We are * * * persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interpret the congressional purpose. * * * [T]he commerce element of a Hobbs Act violation * * * may be satisfied even if the * * * extortion had no actual effect on commerce.

Under this reasoning, petitioners' convictions must also be upheld.

Petitioners emphasize the statement in *Staszcuk* that Hobbs Act "jurisdiction in [a] particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce" (517

F.2d at 60). But by this the court could only have meant a realistic probability that the contemplated transaction, if it had come to pass, would have affected commerce. The court could not have meant that the jury had to assess the likelihood that the hospital would actually be built; the court noted that the record did not explain why the hospital was never built, and it is implausible to suppose that the result in *Staszcuk* would have been different if the evidence showed that the builder's desire to construct the hospital was not a serious intention but only a velleity, or that, as a practical matter, he was never in fact in a position to build the hospital.

Moreover, unlike the defendant in *Staszcuk*, petitioners were convicted of conspiracy, not of a substantive violation of the Hobbs Act. Petitioners appear to recognize, as they must, that they could be prosecuted for conspiracy to violate the Hobbs Act even if their actions had no actual effect on interstate commerce; "the illegality of [a conspiratorial] agreement does not depend on the achievement of its ends." Pet. App. 73 (citing cases). The distinction petitioners apparently seek to draw is between a conspiracy that *did not* affect commerce and one that *could not possibly* have affected commerce. But as the court of appeals noted (*id.* at 75-76), this is an effort to import a defense of impossibility into the law of conspiracy — a defense that has been consistently rejected. See, *e.g.*, *United States* v. *Rindone*, 631 F.2d 491, 492-494 (7th Cir. 1980) (upholding Hobbs Act conviction of municipal employee who extorted a payment even though payment was made from funds supplied by FBI and therefore could not have affected interstate commerce); *United States* v. *Waldron*, 590 F.2d 33 (1st Cir.), cert. denied, 441 U.S. 934 (1979) (upholding conviction for conspiracy to transport stolen goods worth more than $5,000 even though, unknown to conspirators, goods were actually worth less than $5,000); *United States* v. *Rose*, 590

F.2d 232, 235-236 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979) (upholding convictions for conspiracy to transport stolen goods even though the persons engaged by conspirators to commit the thefts were FBI agents who never intended to do so); *United States* v. *Thompson*, 493 F.2d 305, 310 (9th Cir.), cert. denied, 419 U.S. 834 (1974) (upholding conviction for conspiracy to smuggle marijuana even though substance not shown to be marijuana). Petitioners cite no authority to the contrary.

Finally, the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see *Staszcuk*, 517 F.2d at 58. As petitioners appear to recognize, therefore, it necessarily follows from their contention that Congress would lack the power under the Commerce Clause to punish the conduct at issue here. This proposition is plainly incorrect. See *Perez* v. *United States*, 402 U.S. 146, 154-155 (1971). As the court of appeals explained, there is no reason to distinguish the conduct shown in this record from other schemes that Congress undoubtedly could reach and has included within the proscriptions of the Hobbs Act (Pet. App. 78-79):

> [Petitioners] agree that had the government moved from the verbal ruse that its agents were in the hotel construction business to the more concrete action of embarking on that venture * * * the jurisdictional requirement would have been met. However, we see no reason to interpret Congress' legislative power as dependent upon whether the F.B.I. agents actually contract for a hotel site * * *. To require that the government take that additional step before it can constitutionally reach a proved conspiracy which would have affected interstate commerce had the facts

been as represented misdirects the focus of the conspiracy cases. * * *

> In this case the jury found that [petitioners] conspired to violate the Hobbs Act by their acceptance of payments in return for their promises to expedite completion of an elaborate hotel project which, had it been constructed, would have entailed at least a $30 million expenditure. Had the project actually been planned as represented, [petitioners'] actions would have violated the Hobbs Act even if unforeseen difficulties, such as the overthrow of the "sheik," prevented any further action on the project. The federal interest in protecting interstate commerce is no less under the factual situation presented in this case. The threat posed by [petitioners'] actions is just as great.

Moreover, there can be no dispute that the Commerce Clause gives Congress the power not just to punish actual interferences with interstate commerce but to use the criminal law to attempt to deter those who would interfere with commerce. Congress could reasonably conclude that imposing criminal liability on those who engage in the conduct shown by this record would serve a powerful deterrent purpose and thereby protect interstate commerce from extortionate official behavior.

5. Finally, petitioners contend (83-1891 Pet. 16-17; 83-1892 Pet. 28-30) that their Hobbs Act convictions should be reversed because they did not "induce" or "demand" the illicit payments but instead were merely "passive" recipients. As the court of appeals demonstrated, quite apart from the merits of petitioners' interpretation of the Hobbs Act, this characterization of petitioners' role is manifestly incorrect (Pet. App. 82; citations omitted):

> Even if the Hobbs Act were to be construed as requiring some inducement on the part of the public official, [petitioners'] conduct in this case hardly constituted

> merely passive acceptance of the payments. The evidence does not fit [petitioners'] posited illustration of an unexpected bribe mailed to a public official's office. On the contrary, rather than remaining in their own offices, the evidence shows that each [petitioner] arrived at the * * * [agents'] suite after having been briefed about the purported hotel project, the fact that there would be a payment made, and the specific amount of the payment which would be made to each. * * * As soon as each defendant was in the * * * suite, Wald, the F.B.I. agent, promptly repeated the need for * * * assurances. Thereafter, Schwartz launched into a discourse on his own importance and power and his ability to control City Council and the relevant municipal officals and departments, and Jannotti also confirmed his own power. Further, each gave assurances that there would be no obstacles or that the obstacles, if any, would be manageable.

After repeatedly being told that the sheik's representatives were seeking assurances, and responding with boasts about their power and expressions of their intention to cooperate, petitioners were handed envelopes containing, respectively, $30,000 and $10,000 in cash, and they accepted without hesitation. In light of this videotaped record, it is wholly implausible to suggest that petitioners were passive recipients of "gifts" they did nothing to induce.

Petitioners identify no conflict among the circuits on the question whether the Hobbs Act requires the government to show that a public official somehow "induced" the payment. Petitioners cite cases (83-1891 Pet. 16 & n.10; 83-1892 Pet. 29 & n.25) in which government officials were convicted under the Hobbs Act after having been charged with inducing payments. But petitioners do not cite any case in which a conviction under the Hobbs Act was set aside

because the indictment failed to charge (or the jury instructions failed to require the government to show) that defendants who were public officials induced the illicit payment.[6]

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[6]In *United States* v. *O'Grady*, No. 82-1344 (July 12, 1984) (en banc), the Second Circuit reversed a Hobbs Act conviction, stating that "there must * * * be proof that the public official did something, under color of his public office, to cause the giving of benefits" (slip op. 7655). The Second Circuit also said (*id.* at 7659) that in the present case, the Third Circuit ruled that inducement was not necessary. (In fact, the court of appeals in the present case noted only that its prior cases contained the "suggestion that there need be no inducement" (Pet. App. 81).) But the Second Circuit distinguished the present case on the ground that the evidence here "establish[ed] conduct from which inducement can be readily inferred" (slip op. 7660).

The trial court in *O'Grady* specifically instructed the jury that the government "need not show that the defendant in words or otherwise, induced, requested, demanded, or solicited the benefits" (slip op. 7653). The trial court also instructed the jury that in order to convict it need find only that benefits were conferred because the defendant was a public official and that the defendant knew that the benefits were conferred for this reason (*id.* at 7652-7653). It was these instructions that the Second Circuit found to be incorrect. No comparable instructions were given in this case. See Pet. App. 238.

In fact, the district court told the jury that they should convict only if they found a conspiracy "to receive payments in the nature of bribes, that is to say extortion, from the hotel enterprise" (*id.* at 268) and that a particular defendant could be convicted of the Hobbs Act conspiracy only if he knew "that it was an object of the conspiracy that their intent was to so solicit or receive bribes which would amount to extortion and impede interstate commerce" (*id.* at 271). We note that petitioners do not now challenge the jury instruction and indeed appear to endorse the interpretation of the Hobbs Act put forward by the district court in its opinions (see 83-1891 Pet. 26; 83-1892 Pet. 29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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